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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM R. UNDERWOOD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a defendant have a right to have the jury determine beyond a reasonable doubt that his crime extended beyond the date that harsher sentencing provisions became effective?

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**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 932 F.2d 1048 (1991). (App. 1, *et seq.*).

## JURISDICTION

Petitioner was prosecuted in the United States District Court for the Southern District of New York for violating federal narcotics statutes. On May 9, 1991, a panel of the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. (App. 1, *et seq.*). This Court granted Petitioner until October 6, 1991, in which to file this petition. (App. 12).

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 9:

> No Bill of Attainder or ex post facto law shall be passed.

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district. . . .

## STATUTORY PROVISION INVOLVED

Title 21, United States Code, Section 848:

> Continuing Criminal Enterprise defined:
> (d) For the purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter, the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources, to life imprisonment upon his conviction of violation of 21 U.S.C. 848(a), Continuing Criminal Enterprise, in accordance with the Sentencing Guidelines.

## STATEMENT

Petitioner, William Underwood, was charged in the United States District Court for the Southern District of New York with four counts involving narcotics operations. After a trial by jury, he was found guilty on all counts: specifically, violations of 18 U.S.C. §§ 1961 and 1962(c) (racketeering enterprise in violation of the Racketeer Influenced Corrupt Organizations Act); of 18 U.S.C. §§ 1961 and 1962(d) (racketeering conspiracy); of 21 U.S.C. § 846 (conspiracy to violate narcotics statutes); and of 21 U.S.C. § 848(a) (continuing criminal enterprise). The District Court (Judge Cedarbaum) sentenced him in June 1990 in accordance with the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551, *et seq.*

The Sentencing Guidelines became effective on November 1, 1987. For Petitioner's offense level under the Guidelines and the 21 U.S.C. § 848 conviction for a continuing criminal enterprise (CCE), the Guidelines mandated a sentence of life imprisonment without the possibility of parole.[1] The § 846 conviction was subsumed under the CCE sentence, and 20-year concurrent sentences were imposed for each of the other counts.

Petitioner, in the United States Court of Appeals for the Second Circuit, argued, *inter alia*, that the District Court committed error in sentencing him under the Guidelines, because the *jury* did not find that his crimes extended beyond November 1, 1987. Judge Cedarbaum had

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[1] Under the law applicable before November 1, 1987, the District Court would have had discretion to impose a prison term of 10 years to life for the CCE conviction. (We also note that the determinate sentencing system under the Sentencing Reform Act eliminates any possibility of parole. Parole heretofore had been available for conviction of all offenses with few exceptions. One such exception was conviction under § 848.)

orally ruled in February 1990 that the evidence at trial showed that defendant's criminal activities continued past the effective date of the Guidelines. The Court of Appeals affirmed his conviction and sentence of a mandatory life sentence under the Guidelines.

The court below, in an opinion written by Judge Feinberg (App. 1, *et seq.*), found *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), to be dispositive of Underwood's claim. It held that whether a defendant is subject to the provisions of the Sentencing Reform Act is simply a determination to be made by the sentencing judge and, only, with a preponderance of the evidence.

In *McMillan*, there was a constitutional challenge to a state statute that mandated a minimum sentence when the sentencing judge found by a preponderance of the evidence that the offender visibly possessed a firearm during commission of specified felonies. This Court held that neither the Due Process Clause nor the Sixth Amendment is violated when a court determines "sentencing factors" by a preponderance of the evidence. The *Underwood* court below wrote: "We therefore conclude that the factual question as to whether Underwood's offense continued past the effective date of the Guidelines is, in the language of *McMillan*, a 'sentencing factor,' and may be resolved by the district court using a preponderance of the evidence standard." (App. 6).

However, the circuit court below did not concern itself with how *McMillan* differed from the present case. There, the Pennsylvania state legislature had specifically declared that visible possession of a firearm was not an element of a crime, and this Court was reviewing the issue of whether the Constitution was offended by a state's allocation between "elements" of a crime and "factors" of a sentencing scheme. Here, the issue is not what "factors"

are to be applied. Rather, the issue is simply whether the court or the jury should make the appropriate factual finding to determine whether the Guidelines apply at all.

The circuit court below also found its conclusion to be implicit in its prior decision of *United States v. Story*, 891 F.2d 988 (2d Cir. 1989). The principal holding of *Story* was that crimes "straddling" the effective date of the Guidelines (that is, crimes that began before the effective date and continued after the effective date) were to be sentenced under the Guidelines. In *Story*, the circuit court had written that "the jury was entitled to conclude" that defendant's conduct extended beyond the effective date of the Guidelines. The meaning of these words was argued in the instant case below, with appellant maintaining that the jury was to determine whether the crime extended past the effective date of the Guidelines. Yet the *Underwood* opinion interprets these words by saying:

> "[T]he government relies on the same language to argue that the *Story* panel made its own determination from the evidence. We are persuaded that the government's view is the correct one, particularly because in *Story* the panel went on to conclude that the evidence presented at trial established that overt acts in furtherance of the charged conspiracy continued past November 1, 1987, and held that the district court had therefore not erred in applying the Guidelines." [App. 7].

Even assuming this is the proper interpretation of *Story* as to the role of a reviewing court, the case does not dispose of the present issue. The *Story* court was dealing with the legal consequences of crimes that straddle the effective date of the Guidelines. The issue in the instant court below presented the prior factual question of whether or not the crime straddled the effective date.

The *Underwood* court below looked toward other circuits and noted that none had squarely addressed a claim that it is necessary for the jury to make the factual determination of the termination date of a continuing crime. The court noted that the Third, Fourth, Eighth, and Tenth Circuits had *assumed* the question is one for the court.

The *Underwood* court below distinguished *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984), on which appellant relied. The *Orozco-Prada* defendant was charged in a single conspiracy count involving marijuana, cocaine, or both. The court held that, given the general jury verdict, the judge could give the defendant no more than a 5-year sentence, the maximum penalty for a marijuana conviction. In contrast, in the instant case, the court wrote, "there is no ambiguity in the jury verdict regarding the offense of conviction and the date-determination relates only to appellant's sentence." (App. 9). Again, the court below *assumed* that the date-determination was a "sentencing factor" without considering the prior question of who is the appropriate finder of fact as to whether the crime continued into the effective date of the Guidelines.

Finally, the circuit court below discussed cases said to be analogous to the Underwood appeal. These cases held that the quantity of marijuana involved in a trafficking offense related solely to sentencing, and that it was not error to refuse to submit a special interrogatory to the jury as to the amount. However, the circuit court below was once again considering cases that indicated only *how* the Guidelines were to be applied and was not directly addressing the prior question of *who* is the appropriate factfinder for determining whether the Guidelines are to be applied.

## REASONS FOR GRANTING THE WRIT

### 1.

This Court should grant the writ because it has never squarely considered the constitutional question we raise in this petition—namely, how does the Constitution protect Petitioner from the dangers of an "ex post facto" sentence. It has never directly addressed the question of whether it is the jury or the court that must decide whether a crime has extended beyond the effective date of harsher penalties and what is the legal standard by which this factual determination is made. If in fact Petitioner's crime did not extend beyond October 31, 1987, then sentencing him under the Guidelines to a mandatory life sentence under the Sentencing Reform Act violated his right to be free from the burdens of "ex post facto" laws.

Contrary to the characterization in the opinion of the court below, this is not simply a question of the judge's considering aggravating and mitigating factors in sentencing Petitioner. Rather, we believe the question of whether the Guidelines can be applied at all is a factual determination to be made by the jury before the court can determine the appropriate sentence.

Before a defendant can be sentenced, the jury must unanimously find beyond a reasonable doubt that the defendant committed every element of the offense. Also, prior to sentencing, there are other factual determinations that the jury must make beyond a reasonable doubt. These are determinations of the point in time, or period of time, of defendant's criminal conduct.

In order not to offend the Ex Post Facto Clause of the Constitution, the jury must find beyond a reasonable doubt that the defendant violated the statute after its ef-

fective date. Further, that date must not show that prosecution was barred by the statute of limitations. Similarly, in the instant case, we submit that the jury must find beyond a reasonable doubt that criminal conduct of Petitioner extended beyond October 31, 1987, when the provisions of the Sentencing Reform Act took effect. We submit that such a jury finding beyond a reasonable doubt is required because Petitioner here is subject to a harsh mandatory life sentence under the Sentencing Reform Act yet could be sentenced under the pre-Guidelines law to a sentence from 10 years to life.

In short, we think the Court should grant the writ to decide whether a defendant has a right to have the jury decide not only all facts necessary to establish his guilt but also all facts necessary to establish that he is subject to the harsher penalties of a statute after its effective date.

2.

The liberty interests of numerous defendants are affected by the prosecution's burden of proof as to whether the crime occurred or continued beyond the date that harsher penalty provisions took effect. Their liberty interests are also affected by whether it is the judge or a unanimous jury that makes this determination.

Justice Harlan, in his concurring opinion in *In re Winship*, 397 U.S. 358, 372 (1970), has noted that "the social disutility of convicting an innocent man [is not] . . . equivalent to the disutility of acquitting someone who is guilty." He quotes Justice Brennan in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958):

> "Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—

> this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." [*Id.*]

Should not the same constitutional safeguards tilt in Petitioner's favor at his sentencing as they do in determining his guilt or innocence? Although here it is not a question of guilt *vel non*, it is a question of whether Petitioner should be sentenced under the remorseless provisions of the Sentencing Reform Act to life imprisonment or whether Judge Cedarbaum should have the discretion under the old law to impose a sentence of 10 years to life. This writ should be granted to consider whether these same constitutional requirements obtain in the instant case to protect Petitioner from being sentenced under a harsher sentencing scheme, just as those constitutional requirements protect him from being found guilty.

3.

The Court in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), addressed the question of what limitations the Due Process Clause of the Constitution places on a state legislature to make a fact an aggravating factor at sentencing rather than an element of the offense and, thus, a fact to be determined by the jury beyond a reasonable doubt. The Pennsylvania statute at issue provided that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense.

The Court, in an opinion written by Chief Justice Rehnquist, ruled that "the reasonable-doubt standard 'has always been dependent on how a state defines the offense.

. . .' " [*Id.*, at 83.] The Court found the statute was consistent with *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), in neither creating any presumptions nor relieving the prosecution from meeting its burden of proof of every element of the offense.

Although Chief Justice Rehnquist acknowledged his inability "to lay down any 'bright line' test" of when a state had enacted an unconstitutional statute, he held that the Pennsylvania statute was clearly constitutional. (*Id.*, at 91). That statute does not authorize a separate sentence but merely requires a minimum sentence of five years. Thus, it has minimal effect on the sentencing process. (*Id.*, at 88). Moreover, the risk of error in the judge's finding is slight since visible possession of a firearm is "a simple, straightforward issue." (*Id.*, at 84).

Contrary to the issue in *McMillan*, here there is no federal statute providing that it is the sentencing judge who should decide whether a crime extended beyond the date of a harsher sentencing provision. Further, that the state has latitude in defining crimes and specifying what shall constitute aggravating factors or affirmative defenses rather than elements of the offense does not provide us with any precedent for the question we present in this petition.

In this petition, we are not relying on Justice Stevens' discussion in dissent in *McMillan* regarding the requirement of proof beyond a reasonable doubt "of any component of the prohibited transaction that gives rise to both a special stigma and a special punishment." (*Id.*, at 99). There does not seem to be a greater stigma in being convicted of the same crime after the effective date of a more severe penalty provision than before that date. Rather, we are arguing that there are factual determinations other

than the elements of the offense that the Constitution requires the jury to make beyond a reasonable doubt. These are the other factual determinations essential to the determination that the defendant is guilty and essential to the determination that he is subject to a harsher sentencing scheme than otherwise.

4.

The province of the jury has not been confined to finding beyond a reasonable doubt the elements of an offense alone. In a District Court decision directly addressing the question we have posed here, *United States v. Ogull*, 149 F. Supp. 272 (S.D. N.Y. 1957), the court was similarly faced with the possibility of applying the penalty provisions that went into effect after the alleged criminal conspiracy began. It held that a special verdict from the jury was required to make the factual determination—*i.e.*, whether elements of the offense continued beyond the effective date of the more stringent penalty, thereby making a special verdict a condition precedent for imposing the harsher penalty provision.

Other lower courts also have established that other factual questions besides those that constitute the elements of the offense must be made by the jury beyond a reasonable doubt. *See, e.g., United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (defendant's conviction could not stand without the jury being instructed that it could not convict defendant of RICO conspiracy unless it found that the conspiracy continued beyond the effective date of the statute).

A case very similar to the instant case, *United States v. Torres*, 901 F.2d 205 (2d Cir. 1990), involved application of harsher penalties for violation of 21 U.S.C. § 848(b)

which took effect after October 27, 1986. The court required a finding *by the jury* that the defendant held a position of principal or administrator, which was a requirement of the penalty provisions of § 848(b), and held that position *after that date*. Because no such instruction was given to the jury and it had not made such a finding, the court held that defendants had to be resentenced under the provisions of § 848(a), which gave the judge discretion of sentencing the defendant from 10 years to life, instead of the mandated life-sentence under § 848(b).

The same consequences have occurred in the instant case as occurred in *Torres*. Petitioner was sentenced to a mandatory life sentence instead of having his sentence subject to a 10-year to life sentence. In *Torres* there was an effective date of a new statutory penalty provision. In the instant case, there was an effective date of a new determinate sentencing system, replacing the discretionary sentencing permitted under the old law. We maintain that this is a distinction without a difference.

This Court should grant this writ to allow Petitioner to be resentenced. It should grant the writ to enunciate the right of defendants to have a jury determine beyond a reasonable doubt not only whether the government proved all elements of the offense and all issues regarding guilt *vel non*, but also whether the offense was committed after the effective date of a more severe sentencing scheme.

## CONCLUSION

For the reasons given, the Court should grant the writ of certiorari we seek.

Respectfully submitted,

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# APPENDIX

App. 1

932 F.2d 1049 (2nd Cir. 1991)

UNITED STATES of America, Appellee,

v.

William R. UNDERWOOD,
Defendant-Appellant.

No. 933, Docket 90-1394.

United States Court of Appeals,
Second Circuit.

Argued March 22, 1991.

Decided May 9, 1991.

Defendant was convicted of participating in racketeering enterprise, conspiring to participate in racketeering enterprise, participating in narcotics conspiracy, and operating a continuing criminal enterprise, in the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, J., and defendant appealed. The Court of Appeals, Feinberg, Circuit Judge, held that: (1) Government's inadvertent nondisclosure of evidence that informant had initially failed to identify poorly reproduced photograph of defendant's heroin supplier did not entitle defendant to new trial; (2) defendant was not entitled to new trial on ground of newly discovered evidence; and (3) whether defendant's continuing offense extended past effective date of Sentencing Guidelines, and therefore whether defendant could be sentenced under Guidelines, presented factual question to be resolved by court using preponderance of evidence standard, instead of by jury using beyond a reasonable doubt standard.

Affirmed.

* * * * *

Before FEINBERG, MESKILL and ALTIMARI, Circuit Judges.

FEINBERG, Circuit Judge:

William R. Underwood appeals from a judgment of conviction entered in June 1990 in the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, J., after a jury trial. He contends that the district court erred in denying his motion for a new trial based on the government's inadvertent failure to disclose allegedly exculpatory evidence and his subsequent motion for a new trial based on newly discovered evidence. Underwood also claims that the district court erred in sentencing him to life imprisonment in accordance with the Sentencing Guidelines in the absence of a jury determination that his criminal conduct extended past the effective date of the Guidelines. For the reasons set forth below, we find Underwood's contentions to be without merit and affirm.

## Background

The government's evidence at trial showed that from the 1970's until his arrest in late 1988, Underwood supervised and controlled an extensive and extremely violent narcotics trafficking operation involving a number of murders and conspiracies to murder, a highly organized network for the street-level distribution of heroin and the importation of large quantities of heroin from Europe to the United States. The government presented the testimony of more than 50 witnesses, including a number of former members of Underwood's street-level distribution organization, and introduced more than 250 exhibits. Underwood's claims on appeal principally relate to the testimony of Carolyn Cobbs.

Cobbs, a former flight attendant, testified that she worked for Underwood as a courier of heroin and money from 1983 until 1988. She would smuggle large amounts of cash, typically $50,000 per trip, from the United States to Amsterdam or Brussels, where she would give the cash to

Stuart Van Sichem, Underwood's heroin supplier. In the earlier years the heroin was mailed to the United States, but beginning in 1986 Cobbs herself carried the heroin on her return trip. Between January 1986 and September 1988 Cobbs made at least 30 such trips. Cobbs described in some detail how the heroin was packed by Van Sichem, in the hollow sides of jars of a discontinued hair cream product, to be smuggled into the United States and how she regularly returned the empty jars to Van Sichem to be reused. Cobbs' testimony was corroborated in a number of respects by other evidence, including the seizure from Van Sichem's apartment of two jars of the hair cream product showing signs of the type of use Cobbs described.

The jury found Underwood guilty of participating in a racketeering enterprise, 18 U.S.C. § 1962(c) (RICO); conspiring to participate in a racketeering enterprise, 18 U.S.C. § 1962(d) (RICO conspiracy); participating in a narcotics conspiracy, 21 U.S.C. § 846; and operating a continuing criminal enterprise, 21 U.S.C. § 848 (CCE). Underwood was sentenced under the Guidelines to life imprisonment on the CCE count and concurrent terms of 20 years each on the RICO and RICO conspiracy counts; his sentence on the narcotics conspiracy count was combined with the CCE sentence.

## Discussion

### 1. The *Brady* Issue

When Cobbs was shown an array of photocopies of photographs before Underwood's trial, including a photocopy of a telefaxed photograph of Van Sichem, she identified another man as Van Sichem. Shortly thereafter, when the government obtained an actual photograph of Van Sichem to replace the telefaxed copy and showed Cobbs another array of photographs, Cobbs correctly identified Van Sichem. About a month after the jury verdict, in February 1990, the government discovered that it had inadvertenty failed to disclose this information to the

defense pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and so informed defense counsel. Underwood thereupon moved for a new trial. After an evidentiary hearing, the district court ruled that it was "inconceivable" that use of the undisclosed information to impeach Cobbs would have resulted in a different verdict, and denied the motion.

The government's inadvertent nondisclosure of impeachment evidence requires reversal of a conviction only if the evidence is "material," i.e., "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (opinion of Blackmun, J.); see also id. at 685, 105 S.Ct. at 3385 (opinion of White, J.); *United States v. Petrillo*, 821 F.2d 85, 88-89 (2d Cir.1987). In light of Cobbs' identification of the actual photograph of Van Sichem and the substantial evidence corroborating Cobbs' testimony about her dealings with Van Sichem, we agree with the district court that there is no reasonable probability that use at trial of Cobbs' initial failure to identify a poorly reproduced photograph would have resulted in a different verdict, and that the government's inadvertent nondisclosure of the evidence does not entitle Underwood to a new trial.

2. Newly Discovered Evidence

In October 1990 Underwood made a second motion for a new trial, this time on the ground of newly discovered evidence. The motion was based on a written statement made by Van Sichem to Dutch authorities in March 1990, which Underwood claimed would have led to his acquittal because it was materially inconsistent with Cobbs' testimony and showed Cobbs' bias. In that statement, Van Sichem admitted a limited number of relatively minor heroin transactions with Underwood and Cobbs from about 1983 to 1986, but denied any dealing in narcotics after

1986. He also described an occasion on which heroin was packed in the sides of jars as described by Cobbs, but stated that it was Underwood who did the packing and claimed that the two jars seized from his apartment had been left behind by Underwood. Van Sichem also suggested that Cobbs' assertions regarding large and frequent heroin transactions with him were motivated by revenge, apparently for terminating an intimate relationship. After Underwood's motion had been filed, Van Sichem entered into a plea agreement with the United States and subsequently testified at the trial of others allegedly involved in Underwood's heroin-importation scheme. Van Sichem's trial testimony substantially corroborated Cobbs' testimony at Underwood's trial and contradicted the inconsistent statements in his March 1990 statement.

A motion for a new trial on the ground of newly discovered evidence is committed to the discretion of the district judge, whose factual findings are accepted unless clearly erroneous, and whose denial of the motion will be upheld unless there has been an abuse of discretion. See, e.g., *United States v. Diaz*, 922 F.2d 998, 1006-07 (2d Cir. 1990). The relief of a new trial is merited only if, among other things, the evidence would probably lead to an acquittal. Id. In this case, the district court found that even assuming the March 1990 statement was admissible and without considering Van Sichem's subsequent trial testimony, the March 1990 statement "would be more likely to strengthen the government's case than to weaken it." We agree. Moreover, we also agree with the district court that the potential value to Underwood of Van Sichem's March 1990 statement is substantially diminished, if not wholly eliminated, by Van Sichem's subsequent trial testimony corroborating Cobbs' testimony and contradicting those aspects of Van Sichem's March 1990 statement on which Underwood principally relies.

3. Applicability of the Sentencing Guidelines

According to Underwood, the Sentencing Guidelines mandated a sentence of life without parole on his CCE

conviction, but pre-Guidelines law would have allowed the district court discretion to impose a prison term of from 10 years to life. Because of the possibility of a lesser sentence, Underwood maintains that in the absence of a specific jury determination that his offense continued past November 1, 1987, the effective date of the Sentencing Guidelines, he must be resentenced under pre-Guidelines law.

We believe that the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), is dispositive of Underwood's claim. In *McMillan*, the Court considered constitutional challenges to a state statute mandating a minimum sentence for specified crimes if the sentencing judge found by a preponderance of the evidence that the offender visibly possessed a firearm during commission of the offense. The Court found that visible possession of a firearm was not an element of the specified crimes, id. at 85-86, 106 S.Ct. at 2415-16, and did not alter the maximum penalty for committing them, id. at 87-88, 106 S.Ct. at 2416-17, "but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt," id. at 86, 106 S.Ct. at 2416. The Court went on to hold that determination of such sentencing factors by the court by a preponderance of the evidence, rather than by the jury beyond a reasonable doubt, violated neither the due process clause nor the sixth amendment right to a trial by jury. Id. at 91-93, 106 S.Ct. at 2418-20.

Underwood concedes that the question of whether his offense continued past November 1, 1987 has no relevance to his guilt or innocence of the crimes with which he was charged and does not increase the maximum penalty for committing them, but relates solely to his sentence. We therefore conclude that the factual determination as to whether Underwood's offense continued past the effective date of the Guidelines is, in the language of *McMillan*, a "sentencing factor," and may be resolved by the district court using a preponderance of the evidence standard.

Moreover, our conclusion that a defendant is not entitled to a jury finding on the applicability of the Guidelines is, we believe, implicit in our decision in *United States v. Story*, 891 F.2d 988 (2d Cir.1989). We principally held in *Story* that the Guidelines apply to crimes like Underwood's that straddle the effective date of the Guidelines. Id. at 991-96. However, we also addressed one appellant's contention that the jury's determination (in a special verdict) of the amount of cocaine involved in the charged conspiracy necessarily meant that the jury found no culpable conduct after November 1, 1987. Id. at 996. We first rejected appellant's version of the meaning of the jury's quantity determination, stating that "the jury was entitled to conclude" that appellant's culpable conduct continued past November 1, 1987 without finding that appellant expected the deal to involve a larger quantity of cocaine. Id. Underwood relies on the quoted language to argue that the date determination was the province of the jury; the government relies on the same language to argue that the *Story* panel made its own determination from the evidence. We are persuaded that the government's view is the correct one, particularly because in *Story* the panel went on to conclude that the evidence presented at trial established that overt acts in furtherance of the charged conspiracy continued past November 1, 1987, and held that the district court had therefore erred in not applying the Guidelines. Id.

Other circuits confronted with the issue of the applicability of the Guidelines have likewise treated the termination date of a continuing crime as a finding to be made by the district court, albeit without squarely addressing a claim that a jury determination is necessary. For example, in *United States v. Watford*, 894 F.2d 665 (4th Cir. 1990), an appellant contended that he was entitled to be sentenced for his conspiracy conviction under pre-Guidelines law because his criminal conduct ended before the effective date of the Guidelines. In an opinion by Judge Wilkins, the Chairman of the United States Sentencing Commission, the Fourth Circuit upheld the district court's

finding that the Guidelines applied, stating that "the district court correctly used a preponderance of the evidence standard in determining that criminal conduct in furtherance of the conspiracy occurred before and after November 1, 1987." Id. at 670-71. In response to a similar contention in a case in which both the jury (by special verdict) and the district judge had found that the conspiracy at issue continued beyond November 1, 1987, the Eighth Circuit focused on the district judge's conclusion instead of the jury's: "This is a finding of fact which we review under the clearly erroneous standard. . . . After reviewing the ample evidence in the record under this standard, we are satisfied that *the court's finding* was not clearly erroneous." *United States v. Wayne*, 903 F.2d 1188, 1196-97 (8th Cir.1990) (emphasis added). Other circuits, without explicitly so stating, have also apparently assumed that the question is one for the court. For example, the Tenth Circuit has referred to the trial court's "factual determination that the conspiracy continued until December 1987," *United States v. Williams*, 897 F.2d 1034, 1039-40 (10th Cir.1990), and the Third Circuit recently noted in upholding application of the Guidelines that "the jury *and the court* were entitled to conclude that [defendant] chose to remain a culpable member of the conspiracy after November 1, 1987," *United States v. Rosa*, 891 F.2d 1063, 1068-69 (3d Cir.1989) (emphasis added).

Underwood identifies no authority explicitly related to the termination date of a continuing crime, but principally relies on our decision in *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), cert. denied, 469 U.S. 845, 105 S.Ct. 155, 83 L.Ed.2d 92 (1984). His reliance on *Orozco-Prada* is misplaced. In that case, the defendant was charged in a single count with a conspiracy involving marijuana, cocaine or both. The statute provided for a greater maximum sentence for cocaine-related conspiracies than for marijuana-related conspiracies, and the defendant was sentenced to a term in excess of the statutory maximum for marijuana-related conspiracies. We held that a sentence above the statutory maximum for marijuana-related con-

spiracies was improper because the general jury verdict did not reveal whether the jury had found defendant guilty of a cocaine-related or a marijuana-related conspiracy. Id. at 1083-84. In this case, in contrast to *Orozco-Prada*, there is no ambiguity in the jury verdict regarding the offense of conviction and the date determination relates only to appellant's sentence.

In an analogous context, we recently held that because the quantity of marijuana was not an element of the marijuana trafficking offense at issue and related solely to sentencing, a jury determination of the quantity was unnecessary. *United States v. Madkour*, 930 F.2d 234, 237 (2d Cir.1991). The distinction between information necessary to identify the offense of conviction, as in *Orozco-Prada*, and information solely relevant to determining the sentence, as in *Madkour* and in this case, is illustrated by a recent Sixth Circuit case presenting both issues, *United States v. Todd*, 920 F.2d 399 (6th Cir.1990). In that case, the Sixth Circuit noted that the district court had properly submitted a special interrogatory to the jury so that it could specify whether defendant's involvement in the charged conspiracy related to cocaine, marijuana or both, but held that there was no error in the district court's refusal to similarly submit to the jury the question of the quantity of narcotics involved. Citing *Orozco-Prada*, the court explained that the former issue related to the basis of defendant's guilt, a matter for the jury, but the latter was solely a sentencing consideration, to be determined by the court. Id. at 407-08 & n. 7.

In this case, Judge Cedarbaum properly recognized that whether Underwood's continuing offense extended past the effective date of the Guidelines presented a factual sentencing issue to be resolved by the court using a preponderance of the evidence standard. The issue was squarely raised in the district court at a hearing in February 1990; the judge explicitly addressed the question and determined that "there is clear evidence in this record that this enterprise continued past November 1, 1987." That

finding is not clearly erroneous, and we therefore accept it. See 18 U.S.C. § 3742(e); *United States v. Ibanez*, 924 F.2d 427, 430 (2d Cir.1991).

Underwood argues that even if this finding was properly made by the district court by a preponderance of the evidence instead of by the jury beyond a reasonable doubt, a remand to the district court for redetermination is nevertheless required because the court's conclusion might have been affected by the subsequently discovered March 1990 Van Sichem statement denying any dealing in narcotics after 1986. Setting aside the question of whether Underwood waived this claim by failing to raise it below, cf. *United States v. Brody*, 808 F.2d 944, 947 (2d Cir.1986) (pre-Guidelines claim of factual inaccuracy waived because not raised in motion to reduce sentence pursuant to former Fed.R.Crim.P. 35), we are not persuaded that a remand is necessary. Van Sichem's denial in his March 1990 statement of narcotics activity after 1986 is contradicted by substantial evidence presented at Underwood's trial and by Van Sichem's own subsequent testimony at the trial of others involved in Underwood's scheme. Moreover, Judge Cedarbaum did have Van Sichem's March 1990 statement before her in January 1991 when she denied Underwood's motion for a new trial based on newly discovered evidence and found that the Van Sichem statement was not likely to create a reasonable doubt of Underwood's guilt in the minds of the jury. There is no reason to believe that, had Judge Cedarbaum known about Van Sichem's statement in February 1990, she would have reached a different result on the issue of whether Underwood's criminal conduct continued past the effective date of the Guidelines.

We have considered all of appellant's arguments, and we affirm the judgment of conviction.

SUPREME COURT OF THE UNITED STATES

No. A-42

William Underwood,

Petitioner

v.

United States

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 6th, 1991.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 15th
day of July, 1991.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

August 29, 1991

Mr. Donald Morano
1231 Jarvis Avenue
Chicago, IL 60626

Re: William Underwood,
v. United States
Application No. A-42

Dear Mr. Morano:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Marshall, who on August 29, 1991, signed an order extending the time to and including October 6, 1991.

A copy of the Justice's order is enclosed.

Very truly yours,

WILLIAM K. SUTER, Clerk
By
Sandra Elliott Spagnolo
Assistant